IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

FOTOMEDIA TECHNOLOGIES, LLC,

Plaintiff

v.

AOL LLC, AMERICA ONLINE, INC., PHOTOBUCKET.COM, INC., SHUTTERFLY, INC., CNET NETWORKS, INC. AND YAHOO! INC.,

Defendants.

Civil Action No. 2:07-cv-255-TJW-CE

JURY TRIAL DEMANDED

YAHOO! INC.'S ADOPTION OF AND JOINDER IN PHOTOBUCKET INC.'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR A MORE DEFINITIVE STATEMENT, AND MOTION TO STRIKE

Yahoo! Inc. ("Yahoo!") adopts and joins in for all purposes Photobucket Inc.'s Motion to Dismiss or, in the Alternative, for a More Definitive Statement, and Motion to Strike ("Motion"), and in support thereof, would show the Court as follows:

On September 7, 2007, Photobucket Inc. filed its Motion. To best serve justice and avoid unnecessary or duplicative effort, time, or expense to the Court and the parties involved, Yahoo! now adopts and joins in the Motion. For reasons stated in the Motion, Yahoo! requests that the Court either dismiss Plaintiff FotoMedia Technologies, LLC's ("Plaintiff") claims for inducement, contributory infringement, and willful infringement or require Plaintiff to replead to allow Yahoo! to properly respond to Plaintiff's complaint.

Yahoo! would add that the patentee must specifically allege facts to show that the accused infringer knew of its *risk of infringement* or that the risk was "so obvious that it should have been known to the accused infringer." *In re Seagate Technology, LLC,* No. 06-M830, slip

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op. at 12 (Fed. Cir 2007). Fotomedia's allegations fail to recite any such facts. Even if Fotomedia included a simple allegation that the accused infringers were aware of the patents before it filed suit, this allegation would still not satisfy the pleading standard set out by the Supreme Court in *Bell Atlantic Corporation v. Twombly*, 127 S.Ct. 1955 (2007), when viewed in light of the new standard for willfulness set forth in *Seagate*.

The recent Federal Circuit decision in *Mitutoyo Corporation v. Central Purchasing, LLC*, No. 2006-1312, slip op. (Fed. Cir. 2007), is not inapposite to this position. In *Mitutoyo Corporation*, the accused infringer was aware of the patent-in-suit because it had been involved in litigation against the patentee concerning that very same patent. *Id.* at 8. In addition to factual allegations stating that the accused infringer had "full knowledge" of the patent, the patentee's complaint "further provided details" about a previous declaratory judgment suit filed by the accused infringer in 1995 on that same patent. *Id.* By providing factual information about this previous litigation, the patentee's complaint put the defendant on notice of the factual basis for the patentee's allegation that the defendant had knowledge of the risk of its infringement for that patent. Indeed, under the declaratory judgment standard in effect at that time, the accused infringer could not have brought the declaratory judgment action without having received a threat of infringement from the patentee. Accordingly, if the Court permits Fotomedia to its complaint to repair its willful infringement allegation against Yahoo!, the standards set forth by the Supreme Court in *Twombly* and the Federal Circuit *en banc* in *Seagate* require that Fotomedia plead facts to support the required elements of willful infringement—namely, an objectively high likelihood that its actions constituted infringement of a valid patent *and* that the risk of infringement must be known or so obvious that it should have been known to the accused infringer.

Wherefore, Yahoo! respectfully requests this Court to permit Yahoo! to join in and adopt the Motion in its entirety; grant the relief requested in the Motion; and grant Yahoo! such other and further relief, at law and in equity, to which it may be entitled.

Dated: September 7, 2007

Respectfully submitted,

/s/ Scott Partridge

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ATTORNEYS FOR YAHOO!, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 7, 2007, a copy of the foregoing YAHOO! INC.'S ADOPTION OF AND JOINDER IN PHOTOBUCKET INC.'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR A MORE DEFINITIVE STATEMENT, AND MOTION TO STRIKE was served electronically, via CM/ECF, on all counsel of record below who are deemed to have consented to such service under the Court's local rules. Any other counsel of record will be served via facsimile and certified mail, return receipt requested.

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